See Dec 3486 3489

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MALAGON-RAMIREZ, No. 22588

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the Southern District of California

Honorable Fred Kunzel, District Judge

BRIEF IN SUPPORT OF MOTION OF COUNSEL TO BE RELIEVED FROM PERFECTING AND PROSECUTING PETITION FOR CERTIORARI.

LANGFORD, LANGFORD & LANE
By J. PERRY LANGFORD
439 Spreckels Building
San Diego, California 92101

Telephone: 714-232-1053

Attorneys for Appellant

TOPICAL INDEX

TOPICAL INDEX - Continued

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED - Continued

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MALAGON-RAMIREZ, No. 22588

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the Southern District of California

Honorable Fred Kunzel, District Judge

BRIEF IN SUPPORT OF MOTION OF COUNSEL TO BE RELIEVED FROM PERFECTING AND PROSECUTING PETITION FOR CERTIORARI.

ISSUE PRESENTED FOR DETERMINATION

May counsel, who was appointed pursuant to the Criminal Justice Act and who represented appellant in an appeal to the Court of Appeals which resulted in an affirmance of the judgment of the District Court, refuse to prepare and file a petition for certiorari in the United States Supreme Court on behalf of appellant, upon the ground that, although he believes that the judgment of the Court of Appeals is incorrect, he is also of the opinion that the errors, considered in the light of Rule 19 of the

Rules of the Supreme Court of the United States, are not of such a nature as to justify the filing of a petition?

STATEMENT OF THE CASE

Appellant was convicted in the United States District Court for the Southern District of California of smuggling, concealing, and facilitating the transportation and concealment of approximately one ounce of heroin and 70 pounds of marijuana in violation of United States Code, Title 21, Sections 174 and 176(a). (R. 2-5, 21). He appealed, and this Court affirmed the conviction. (MALAGON-RAMIREZ vs. UNITED STATES, 404 F.2d 604).

Appellant was permitted to appeal in forma pauperis and his present counsel, J. Perry Langford, was appointed by the District Court to represent him on appeal. (R. 27-28). After the judgment of conviction was affirmed by this Court, appellant requested counsel to prepare and file a petition for certiorari in the United States Supreme Court. Instead of doing so, counsel for appellant filed in the United States Supreme Court a document entitled, "Refusal of Counsel Appointed Under the Criminal Justice Act of 1964 to File Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on Behalf of Indigent Petitioner". In that document counsel took the position that, while this Court had erred in its decision, in the professional opinion of counsel the errors

are not of such character that the Supreme Court would grant a hearing. (United States Supreme Court Rule 19; Refusal, p. 3). However, counsel suggested that the document might be construed as a petition for certiorari as to the issue of counsel's obligation to file a petition, and that the merits of the issues on appeal should also be reviewed. (Refusal, pp. 2, 5).

Upon the filing of the Refusal, Mr. Justice Douglas, as Circuit Justice, extended the time for filing a petition for certiorari. At this stage of the proceedings, counsel was advised by the Clerk of the United States Supreme Court that the Refusal could not be construed as a petition for a writ of certiorari, since there was no judgment subject to review. (Letter dated December 20, 1968). No further action was taken by appellant or his counsel, and the extended time expired. Thereafter, the Supreme Court made its order of February 24, 1969, treating the Refusal as a petition, taking no action upon it as such, and remanding to this Court the question whether appellant's counsel is obligated to prepare and prosecute a petition for certiorari on the merits.

ARGUMENT

Summary

Appellant is entitled to the representation of counsel and to counsel's best efforts to obtain a reversal of his conviction. Since the instant proceedings are directed toward that objective, there is no conflict of interest between appellant and his counsel.

While the Constitution, applicable statute and rule, and the Ninth Circuit Judicial Council provisions for counsel on appeal all entitle appellant to representation, none of them entitles him to require counsel to file a petition for certiorari which counsel believes is unwarranted. The Judicial Council provision may not be construed to broaden the constitutional and statutory right to counsel, for to so construe it would render the provision invalid to that extent as ultra vires. The rules of DOUGLAS vs. CALIFORNIA, 372 U.S. 353, and ANDERS vs. CALIFORNIA, 386 U.S. 738, are not applicable to certiorari. Permitting counsel to refuse to file unwarranted petitions does not subject indigent appellants to unequal treatment. Requiring counsel to file such petitions would impair the judicial system by flooding the Supreme Court with them.

I

THERE IS NO CONFLICT OF INTEREST BETWEEN APPELLANT AND HIS COUNSEL IN THIS COURT, BECAUSE THE ULTIMATE OBJECTIVE OF BOTH IS REVIEW OF THE MERITS OF THE APPEAL BY THE UNITED STATES SUPREME COURT.

At the outset of the discussion it must be stressed that appellant's counsel does not seek to be relieved as such. Rather, we assert the right to remain as counsel and yet refuse to file a petition which we believe is not warranted. Since this stance is rife with the possibility of conflict of interest between appellant and counsel, we begin with an explanation as to why there is no conflict of interest as to the proceedings in this Court and how we propose to utilize the conflict in the Supreme Court to obtain a review of the merits of the appeal.

We fully recognize appellant's right to be represented by counsel at all stages of an appeal, including the determination whether a petition for certiorari is warranted and the filing of such a petition, if warranted. Moreover, we believe that it is the duty of counsel to use every ethical means to achieve the objectives of his client, even if the prospects of success are slight. However, it is the right and the duty

of counsel to determine strategy and means and to decide what steps are ethical. This right includes the authority of counsel to decide that nothing further can be done -- to refuse to file a petition for certiorari which he believes is unwarranted.

Appellant's objective is review and reversal of his conviction by the United States Supreme Court. We have embarked upon the present proceedings because we believe that they offer his best hope of achieving that objective. Therefore, there is no conflict between attorney and client as to the ultimate objective.

There also appears to be no conflict as to procedures to be adopted in this Court. We believe that the counsel issue was remanded to this Court because of the objection to treating the Refusal as a petition for certiorari raised in the Clerk's letter, viz., that there has been no judgment on that issue to be reviewed by the Supreme Court. In due course this Court will remedy that defect by ruling on the motion. Whichever way this Court rules, we intend to file a petition for certiorari from the ruling. Therefore, appellant should not be harmed by any ruling of this Court, so we are free to argue the merits of the motion without restriction due to conflict

of interest between appellant and counsel.

In the Supreme Court, the situation will be somewhat different. There, if the Court rules that counsel need not prepare and file a petition for certiorari on the merits, appellant may be out of court. Therefore, we cannot make an argument for such a result in that Court. In order to hear us on the counsel question, the Supreme Court must agree to review the merits of appellant's appeal. We intend to utilize this necessity to obtain review of appellant's conviction by the United States Supreme Court, which we believe could not be obtained in any other way. Whatever may be thought of the prospects of success of this strategy, we submit that it offers greater prospects of success than an ordinary petition for certiorari, and that it fulfills our obligation to appellant under the Sixth Amendment and otherwise.

II

THE EXTENT OF AN INDIGENT APPELLANT'S RIGHT TO REQUIRE HIS APPOINTED COUNSEL TO PREPARE AND FILE ON HIS BEHALF A PETITION FOR CERTIORARI IN THE UNITED STATES SUPREME COURT IS GOVERNED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IMPLEMENTED BY THE CRIMINAL JUSTICE ACT OF 1964 AND RULE 44, FEDERAL RULES OF CRIMINAL PROCEDURE. PARAGRAPH 4(c) OF, "PROVISIONS FOR THE REPRESENTATION ON APPEAL OF DEFENDANTS FINANCIALLY UNABLE TO OBTAIN REPRESENTATION", ADOPTED BY THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT, WAS NOT INTENDED TO BROADEN THE SCOPE OF THE CONSTITUTIONALLY CONFERRED RIGHT, AND THE JUDICIAL COUNCIL IS WITHOUT LEGISLATIVE AUTHORITY TO BROADEN IT.

Appellant's right to counsel has its foundation in the provisions of the Fifth and Sixth Amendments to the United States Constitution, implemented by the Criminal Justice Act of 1964, (United States Code, Title 18. Section 3006A), and Rule 44, Federal Rules of Criminal Procedure. However, before considering the scope of the right thus conferred, it is necessary to consider the significance for this case of Section 4(c) of the, "Provisions for the Representation on Appeal of Defendants Financially Unable to Obtain Representation", adopted by the Judicial Council of the Ninth Circuit, pursuant to the provisions of the Criminal Justice Act of 1964. That Section provides:

> "(c) Certiorari. Following decision on appeal, if the appeal is unsuccessful, counsel appointed shall advise the defendant of his right to initiate a further review by the filing of a petition for certiorari, and, if requested to do so by the defendant, file such petition. If the defendant does not desire to seek certiorari, counsel shall file with the Clerk a statement to that effect, signed by counsel and the defendant. If the defendant refuses to sign, counsel shall so state." (Appendix to United States Court of Appeals for the Ninth Circuit Rules. 28 U.S.C.A., Court of Appeals Rules Volume, pp. 423-424).

The appeal was unsuccessful in this Court. Appellant did request his counsel to file a petition for certiorari. A literal interpretation of Section 4(c) suggests that counsel is bound to file such a petition, no matter what the constitution may require. However, for several reasons

the issue in the case at bar may not be disposed of upon such an interpretation of the rule.

In the first place, if literal interpretations are to be indulged in, the Supreme Court has construed the document filed by appellant's counsel as a petition for certiorari. Therefore, Section 4(c) has been literally complied with, and the only remaining question is whether the manner of compliance satisfies appellant's rights under the Fifth and Sixth Amendments to the United States Constitution.

A second, and we submit more reasonable, approach is to construe Section 4(c) in the light of its purpose and within the scope of the powers of the Judicial Council. The Provisions were adopted pursuant to the requirement of United States Code, Title 18, Section 3006A (a), requiring that the Judicial Council supplement District Court plans adopted under the Criminal Justice Act with provisions for the representation on appeal of defendants financially unable to obtain representation. The manifest purpose of Section 4(c) is to declare that representation on appeal includes responsibility for the filing or non-filing of petitions for certiorari and for advising appellants with regard thereto. The rule is intended to insure that this

responsibility is assumed by counsel and that an appellant's right to petition is not lost through inadvertence. So construed, Section 4(c) is a valid exercise of the authority conferred upon the Judicial Council by the Criminal Justice Act.

While the Judicial Council could properly insure that appellants are represented in connection with petitions for certiorari, it could not properly interfere with the manner in which counsel carry out that representation. No one would suggest that the Council has the power to say what issues counsel should raise in a petition for certiorari. It is doubtful that even the Congress has that power, and if it has, the Criminal Justice Act does not delegate the power to the Judicial Council. In a case in which counsel believes there is no issue which merits a grant of certiorari, a requirement that he nevertheless file a petition is in effect a dictate that he urge an unmeritorious ground. Section 4(c) should therefore be construed as requiring only that counsel file petitions for certiorari in cases in which they believe that such a petition is warranted. To construe the Section otherwise would render it invalid as beyond the scope of the power conferred upon the Judicial Council by the Congress.

III

APPELLANT MAY NOT REQUIRE HIS COUNSEL TO FILE A PETITION FOR CERTIORARI UPON GROUNDS WHICH IN THE OPINION OF COUNSEL DO NOT WARRANT A GRANT OF THE WRIT UNDER THE APPLICABLE SUPREME COURT RULE, BECAUSE SUCH A REQUIREMENT WOULD BE BEYOND THE SCOPE OF THE RIGHTS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS CONSTRUED BY THE UNITED STATES SUPREME COURT.

A. Relevant decisions.

In DOUGLAS vs. CALIFORNIA, 372 U.S. 353, the Supreme Court struck down, principally upon the ground of violation of the Equal Protection Clause, a California procedure pursuant to which:

> "appellate courts should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court." (Page 355).

In so ruling the Supreme Court said:

> "We are not here concerned with problems which might arise from the

denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the first appeal granted as a matter of right to rich and poor alike (Cal. Penal Code §§ 1235, 1237), from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction (see Cal. Const., Art. VI, § 4(c); Cal. Rules on Appeal, Rules 28, 29), or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as

of right or by petition for a writ of certiorari which lies within the Court's discretion." (DOUGLAS vs. CALIFORNIA, 372 U.S. 353, 356).

In ANDERS vs. CALIFORNIA, 386 U.S. 738, the Supreme Court was confronted with the next step in the evolution of California procedure for providing counsel for indigent appellants. In ANDERS counsel was again appointed on a first appeal. Counsel concluded that there was no merit to the appeal and simply wrote a letter to the court to that effect. Appellant was permitted to file a brief pro se. The judgment was affirmed. The Supreme Court reversed. It concluded that counsel's bare conclusion, expressed in his letter, was not enough. The Court went on to state:

> "We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as amicus curiae which was condemned in Ellis, supra. Hence California's procedure did not furnish petitioner with counsel

acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." (ANDERS vs. CALIFORNIA, 386 U.S. 738, 743). The Court continued: (Page 744, Footnote omitted)

"The constitutional requirement of substantial equality and fair process can only be obtained where counsel acts in the role of an active advocate in behalf of his client as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious

examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal."

The case of LANE vs. BROWN, 372 U.S. 477, in-

volved a different but related subject. BROWN, an indigent defendant subject to a death sentence, brought a coram nobis proceeding, in which he was represented by the Public Defender, to attack his conviction. The proceeding was unsuccessful, and he sought to appeal. However, under Indiana law, he could not appeal unless he could obtain a transcript. Only the Public Defender could order a transcript at public expense. He refused. On federal habeas corpus the Supreme Court remanded the case for the making of appropriate orders requiring that BROWN be discharged, unless Indiana accorded him an appeal. The ruling was predicated upon the ground that:

> "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. . ." (LANE vs. BROWN, 372 U.S. 477, 484).

The rule was expressly made applicable to collateral attacks. (Page 484).

The foregoing cases establish the following principles:

1. Every criminal appellant is entitled to

counsel on his first appeal.

2. That counsel must act as an advocate, not as amicus curiae.

3. Counsel's advocacy on a first appeal must culminate in a brief which says whatever there is to be said for appellant's case and assists the court in its own examination of the record.

4. Only if after such a procedure the court finds the appeal to be frivolous can the assistance of counsel be dispensed with.

5. The foregoing rules are not applicable to discretionary review after the first appeal.

6. Subsequent stages of appellate review may not be foreclosed on the ground of poverty.

B. An Appellant is entitled to counsel in determining whether to petition for certiorari, and in filing a petition with substantial merit, but he is not entitled to require counsel to file an unmeritorious petition.

The Supreme Court has made clear in DOUGLAS vs. CALIFORNIA, 372 U.S. 353, and ANDERS vs. CALIFORNIA, 386 U.S. 738, that the holdings in those cases do not entitle every appellant to have counsel file a petition for certiorari on his behalf. However, the line of cases

including LANE vs. BROWN, 372 U.S. 477, makes it equally clear that an appellant is not wholly without rights after losing the first round. There is a dearth of authority as to the rights of a person situated as is appellant in the case at bar. In the absence of authority, we shall attempt to construct a reasonable solution to the problem.

We begin with the principle of LANE vs. BROWN that an appellant may not be foreclosed on account of poverty. If an appellant could be set adrift without counsel upon affirmance of his conviction by a Court of Appeals, he could effectively be deprived of his right to petition for certiorari through ignorance. Therefore, it may fairly be concluded that appellate counsel must at least advise appellant of his right to petition and of any grounds for a petition. Moreover, if there are grounds, counsel must either file a petition or advise appellant as to the procedure for doing so. Though there is no clear authority, we submit that it should be held that if counsel finds grounds for a petition for writ of certiorari, he must either file or petition the Court of Appeals to appoint other counsel who will do so. Anything less would seem to deprive an appellant of the fairness and equal treatment which is the goal of such cases as ANDERS and

DOUGLAS.

We submit, however, that the foregoing reasoning does not entitle an appellant to a petition prepared by counsel in all cases. This conclusion is supported not only by the disclaimers of the Supreme Court in ANDERS and DOUGLAS, but by an examination of the differences between first and subsequent appeals.

DOUGLAS and ANDERS stand for the proposition that, for so long as appellant has a right to appeal, i.e., unless and until it has been established that the appeal is wholly frivolous, the appellant is entitled to the representation of counsel acting in the role of advocate. Once the right to appeal has been found by the court not to exist, however, the right to the services of an advocate ceases. Since certiorari is a discretionary writ to which no litigant has an absolute right, the right to the assistance of counsel in pursuing it is likewise not absolute.

The procedural obligations imposed upon counsel in ANDERS are designed to insure that the determination as to frivolousness of an appeal is made by the court, and it is an informed one which has been arrived at with the benefits of an advocate's presentation. The im-

position of these requirements is simply an application of the rule of LANE vs. BROWN, 372 U.S. 477, that no one but a court can divest appellant of his right to appeal and of the rule of DOUGLAS and ANDERS that, while the right to appeal exists, so does the right to counsel.

The procedural obligations imposed in ANDERS are not properly applicable to petitions for certiorari, because their purposes have already been served. On a first appeal the court is normally confronted with a voluminous record in which clues to potential appellate issues are buried. The first task of an advocate is to exhume those issues. However, that task could be performed objectively by a law clerk. The important function of an advocate is to approach the record from the point of view of the appellant, collect legal contentions supporting that view, and sell the appellate court on the validity of the view and of the correctness of the contentions. By the time an appeal reaches the stage of a petition for certiorari to the United States Supreme Court, counsel has fully performed these functions. He has acted in the role of advocate. The opinion of the appellate court will ordinarily reveal the issues. Appellant's viewpoint, if not revealed in the opinion, is at least available to the

Supreme Court in his briefs filed in the appellate court. The question, then, is whether an appellant has rights on certiorari additional to those which he possesses on appeal.

Additional functions performed by counsel in petitioning for a writ of certiorari include the formulation of the questions presented and the statement of reasons for granting the writ. Nothing stated here should be understood as denigrating the vital importance of these functions. However, ordering a lawyer to perform them is a far different matter from requiring him to prepare a statement of the case and summary of possible issues on appeal. (ANDERS vs. CALIFORNIA, 386 U.S. 738, 744). If a lawyer, after examining Rule 19 of the United States Supreme Court Rules, determines that he has nothing to say which is likely to persuade the Supreme Court to grant a petition for writ of certiorari, his professional judgment in that regard should be accepted. Nothing in either the Constitution or the applicable decisions suggests a contrary conclusion.

C. Permitting counsel to refuse to file a petition for certiorari which he believes is unwarranted does not subject an indigent to unequal treatment, because

ethical counsel do not file such petitions on behalf of paying clients.

Appellants may not be discriminated against upon the ground of poverty at any stage of an appeal. (LANE vs. BROWN, 372 U.S. 477, 484). Therefore, if appellants with ample funds may compel their attorneys to file petitions for certiorari which they deem unwarranted, then indigents must be given the same right. However, to assume that solvent appellants can obtain petitions deemed unwarranted by the lawyers who write them is to assume that, in general, the members of the Bar of the United States Supreme Court are prostitutes. On the contrary, eithical lawyers do not file petitions for certiorari which they believe are unwarranted. In fact, any inequality between indigents and paying clients favors the filing of petitions on behalf of indigents. The indigent has nothing to lose, while a most effective way of dissuading a paying client from proceeding in a marginal case is to first advise him of his chances and then fix the fee. In this context it may not reasonably be argued that indigents receive unequal treatment when they are not permitted to compel their attorneys to file petitions for certirorari which they consider unwarranted.

D. The assistance which counsel might render to the Supreme Court does not justify a rule requiring the filing of petitions for certiorari which counsel deem unwarranted.

Aside from the issue of the rights of appellant, there remains the question whether a rule requiring counsel to prepare all petitions for certiorari which appellants wish to file would not be of assistance to the Supreme Court in the performance of its arduous task. It is certainly easier for the Court to fully evaluate petitions prepared by counsel. However, we submit that the price at which such assistance to the Court might be obtained would be too high.

If the right to have counsel prepare unwarranted petitions for certiorari is to be accorded, it must be accorded on equal terms to all appellants, whether from state or federal courts. Nothing is easier than for an indigent appellant to say, "File". If such a rule were adopted, the inevitable result would be that sooner or later the Supreme Court would become so inundated with petitions that it would no longer be able to personally evaluate them. Such a result would be a grievous blow to our judicial system, and its most serious victims would be

criminal appellants with legitimate grounds for certiorari. We submit that, rather than adopt a rule which would encourage groundless petitions, it should be settled that counsel are, so far as constitutionally possible, permitted to control the litigation in which they are engaged. If they cannot be trusted to exercise their power of control with due regard for the rights of their clients, then they should not have been appointed in the first place.

CONCLUSION

For the foregoing reasons the motion of counsel to be relieved from perfecting and prosecuting a petition for a writ of certiorari in the Supreme Court of the United States from the judgment of this Court affirming appellant's conviction should be granted. The order granting the motion should specify that counsel is not relieved from representing appellant and is authorized and directed to take such further action in the case on appellant's behalf as counsel may deem warranted.

Respectfully submitted,

LANGFORD, LANGFORD & LANE

By_____
J. Perry Langford

Attorneys for Appellant